

## 37 Am. Jur. 2d Fraud and Deceit § 68

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### Fraud and Deceit

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#### IV. False Representations

##### B. Necessity that Representation Be of Fact; Opinions

##### 2. Distinctions Between Statements of Fact and Opinion

## § 68. Representation of matter susceptible of knowledge

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### West's Key Number Digest

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To be actionable, a representation must relate to a fact that is susceptible of knowledge;<sup>1</sup> otherwise, there is nothing in relation to which the person making such representation could state what he or she knew to be untrue.<sup>2</sup>

The distinction between fact and opinion is broadly indicated by the generalization that what was susceptible of exact knowledge when the statement was made is usually considered to be a matter of fact.<sup>3</sup> Representations in regard to matters not susceptible of definite knowledge are generally to be regarded as mere expressions of opinion<sup>4</sup> even where they are made positively and as though they are based on the maker's own knowledge.<sup>5</sup> Usually, also, to say that a thing is only a matter of opinion imports that it is unsusceptible of proof<sup>6</sup> or that it cannot be verified.<sup>7</sup> Conversely, a statement is factual where it deals with existing, quantifiable data.<sup>8</sup>

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#### Footnotes

<sup>1</sup> Jensen v. Taco John's Intern., Inc., 110 F.3d 525 (8th Cir. 1997) (applying Minnesota law); Greenleaf Arms Realty Trust I, LLC v. New Boston Fund, Inc., 81 Mass. App. Ct. 282, 962 N.E.2d 221 (2012), review denied, 462 Mass. 1107, 969 N.E.2d 718 (2012); Constance v. B.B.C. Development Co., 25 S.W.3d 571 (Mo. Ct. App. W.D. 2000) (susceptible of exact knowledge).

<sup>2</sup> Sorrells v. Clifford, 23 Ariz. 448, 204 P. 1013 (1922); Kennedy v. Flo-Tronics, Inc., 274 Minn. 327, 143 N.W.2d 827 (1966); Patterson v. Bushong, 196 S.W. 962 (Tex. Civ. App. Fort Worth 1917), writ refused, (June 5, 1918).

<sup>3</sup> Nota Const. Corp. v. Keyes Associates, Inc., 45 Mass. App. Ct. 15, 694 N.E.2d 401 (1998) (actual knowledge); Reis v. Peabody Coal Co., 997 S.W.2d 49 (Mo. Ct. App. E.D. 1999); Bishop Logging Co. v. John Deere Indus. Equipment Co., 317 S.C. 520, 455 S.E.2d 183, 28 U.C.C. Rep. Serv. 2d 190 (Ct. App. 1995).

<sup>4</sup> Radioshack Corp. v. ComSmart, Inc., 222 S.W.3d 256 (Ky. Ct. App. 2007).

<sup>5</sup> Nye Odorless Incinerator Corp. v. Felton, 35 Del. 236, 162 A. 504 (Super. Ct. 1931).

<sup>6</sup> Nye Odorless Incinerator Corp. v. Felton, 35 Del. 236, 162 A. 504 (Super. Ct. 1931); Coons v. Bank of Commerce, 233 Ky. 457, 26 S.W.2d 15 (1930); Colorado Milling & Elevator Co. v. Rapides Grocery Co., 142 So. 626 (La. Ct. App. 2d Cir. 1932).

<sup>7</sup> VNA Plus, Inc. v. Apria Healthcare Group, Inc., 29 F. Supp. 2d 1253 (D. Kan. 1998) (applying Missouri law).

<sup>8</sup> Peter J. Hartmann Co. v. Capital Bank and Trust Co., 296 Ill. App. 3d 593, 230 Ill. Dec. 830, 694 N.E.2d 1108 (1st Dist. 1998).

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